United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4052 "Original"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TNT TARIFF AGENTS, INC. and
NATIONAL CARLOADING CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents,

and

EASTERN CENTRAL MOTORS CARRIERS
ASSOCIATION, INC. and
ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.,

Intervenors.

ON PETITION TO REVIEW AND SET ASIDE ORDERS
OF THE INTERSTATE COMMERCE COMMISSION

JOINT BRIEF OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

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JOINT BRIEF OF THE UNITED STATES OF AMERICA
AND THE INTERSTATE COMMERCE COMMISSION

ISSUE PRESENTED

Whether the Commission's determination that TNT's allowance of $1.00 per hundred pounds is unjust and unreasonable was procedurally proper and supported by subtantial evidence.

STATEMENT OF THE CASE

In this action, petitioners TNT Tariff Agents Inc. and National Carloading Corporation (hereinafter referred to collectively as "TNT") seek to set aside orders of the Interstate Commerce Commission entered in two separate, but

closely related, administrative proceedings. In I.C.C. Docket No. 35921, the Commission found that TNT's "Tariff East," which published an allowance to shippers of $1.00 per hundred pounds on shipments delivered to the forwarder's facilities, had been shown to be unjust and unreasonable. In I.C.C. Docket No. 35921 (Sub-No.1), the Commission made the same finding with respect to TNT's "Tariff West," which published an identical allowance applicable to traffic originating on the West Coast.

BACKGROUND

Since the rates at issue in the present case were published by freight forwarders, it may be helpful at the outset to briefly review the nature of the transportation service which freight forwarders provide. A freight forwarder is a carrier subject to Sections 401-422 of the Interstate Commerce Act, 49 U.S.C. §§1001-1022, which holds itself out to the general public to provide, in its own name and under its own responsibility, a through freight transportation service from the point of receipt of a shipment to the final destination. The forwarder issues a single bill of lading covering the entire movement and designating the forwarder itself as the carrier. However, except for limited movements within its own terminal areas, a freight forwarder does not and cannot itself perform the actual physical transportation of the freight, but instead must utilize the services of motor, rail and water carriers. Thus, in relation to the

owner of the freight the forwarder is considered to be a carrier, while in relation to the underlying carriers who actually perform the transportation the freight forwarder is considered to be a shipper.

The freight forwarder is able to occupy this unique position, and is in fact needed by so many small shippers, largely because of its efficient service, as well as the traditional wide spread in rates assessed on large and small shipments by rail, motor or water carriers. By consolidating many small shipments (tendered by numerous, individual shippers) into larger loads, a forwarder is able to move freight expeditiously and obtain from rail, motor or water carriers a full-carload or full-containerload rate. This allows it, in turn, profitably to assess rates against the individual small shippers that are competitive with, and often lower than, the less-than-carload or less-than-containerload rates that would apply if the individual shipments had been tendered directly by each shipper to the rail, motor, or water carriers. See Chicago, M. St. P. & Pac. R. R. v. Acme Fast Freight, Inc., 336 U.S. 465, 467, 484 (1949); United States v. Chicago Heights Trucking Co., 310 U.S. 344, 345-46 (1940); Acme Fast Freight, Inc. v. United States, 30 F. Supp. 968, 970 (S.D. N.Y. 1940), aff'd per curiam, 309 U.S. 638.

The rates of freight forwarders are initiated and

regulated in much the same manner as those of other carriers subject to the Act. Thus, freight forwarder rates are set by the forwarders themselves, subject to disapproval by the Commission on the grounds that they are unjust or unreasonable, or result in unjust discrimination or undue preference or prejudice. Sections 404(a) and (b), 406. Tariffs clearly stating all rates and charges must be published and filed with the Commission, and no rate, or change in any existing rate, may become effective except after 30 days' notice filed and posted in accordance with the Act. Section 405.[1/] Tariffs may be published and filed by the forwarder itself or by a tariff agent (such as TNT) on behalf of those forwarders who elect to participate.

While the Commission has the power to find a rate unlawful in proceedings instituted either before or after the rate becomes effective, certain procedural changes in the exercise of that power occur at the end of the 30-day notice period. Prior to the effective date, the Commission is authorized to suspend the proposed rate for up to seven months while it conducts an investigation concerning the lawfulness of the rate. Section 406(e). The Commission's rules dictate the form in which tariffs must be published

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1/ The Commission, in its discretion and for good cause, may allow changes upon less than the statutory notice (Section 405(d)).

so that, within the 30-day notice period, the Commission's staff and other interested persons will be able to quickly ascertain whether the suspension power should be invoked. 49 C.F.R. 1309. In any investigation commenced during the 30 day notice period, upon either the Commission's own initiative or the complaint of any person, the burden of proof is on the forwarder to show that the proposed rate change is just and reasonable.

If the Commission takes no action pursuant to Section 406(e) prior to the effective date of any tariff, the rates contained therein become the "legal" rates which the forwarder must charge and the shipper must pay. Section 405(c). Such rates are not necessarily "lawful" rates, however. The lawfulness of a rate may be determined at any time in a proceeding instituted by the Commission upon its own initiative or at the complaint of any interested party. Section 406(a). In such a proceeding instituted after the rate has become effective, the burden of proof is on the complaining party (or the Commission) to show that the rate is unreasonable or otherwise unlawful.

Of particular significance to the case at bar is Section 415 of the Act, which provides that if the owner of property performs a portion of the transportation service which the forwarder would ordinarily render, the allowance to the owner for such service must be no more than is just

and reasonable. If a forwarder were to reduce its rates by an amount in excess of that which would be just and reasonable, the allowance would constitute an unlawful rebate to the shipper. Here, the Commission found that the involved allowance of $1.00 per hundred pounds for delivery to the forwarder's terminal had been shown to be unjust and unreasonable.

PROCEEDINGS IN DOCKET NO. 35921

By order dated October 19, 1973, the Commission instituted an investigation concerning the lawfulness of Items Nos. 619 and 8004C of TNT Tariff No. 14 ("Tariff East"), which Items had become effective on or about September 10, 1973. The effect of these Items, the text of which is reproduced in the Joint Appendix at pp. 108a-109a[2/], is to reduce the forwarder's published full service rates by $1.00 per hundred pounds when shipments are delivered directly to the forwarder's terminal. The Commission's investigation of Tariff East was prompted by the filing on or about October 1, 1973, by Lifschultz Fast Freight, Inc., of a similar tariff provision. The Lifschultz

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2/ In keeping with the method of citation utilized by petitioners, the Joint Appendix will hereinafter be referred to as "JA" without designation of p. (page) or pp. (pages).

provision was protested by the Eastern Central Motor Carriers Association, Inc. ("Eastern"), suspended by the Commission, and also made the subject of an investigation.[3/]

Docket No. 35921 was ordered to be handled under the Commission's modified procedure rules, 49 C.F.R. §1100.45 et seq., whereby all evidence is introduced in the form of verified statements (i.e. affidavits) and cross examination of witnesses is permitted only to resolve material factual disputes. TNT's opening statement (JA 30a) sought to characterize its Tariff East as a "dock rate" rather than an "allowance," to show that the publication of dock rates is an established form of ratemaking, and to demonstrate that numerous shippers favored the tariff. TNT presented no evidence of the cost to itself or to shippers of performing the pickup service. TNT did assert that freight forwarder costs were "skyrocketing," but offered no evidence of the extent of any increase in costs. Eastern's statement (JA 78a) presented evidence which indicated that the cost of performing pickup was less than $1.00 per hundred pounds on shipments of 500 pounds and above in Eastern Central Territory.

3/ The Lifschultz proceeding was docketed as Investigation and Suspension Docket No. 8894. While I.&S. No. 8894 remained a proceeding distinct from No. 35921, the two cases were consolidated for the purpose of decision due to the similarity of the issues involved. Lifschultz has elected not to seek judicial review of the Commission's orders cancelling its tariff.

TNT's reply statement (JA 98a) offered no additional evidence, but argued that Eastern's cost evidence pertained only to motor carriers and should be given no weight in determining the reasonableness of freight forwarder rates.

The initial decision of the Administrative Law Judge ("ALJ"), served on March 22, 1974, held that Eastern had established a prima facie case that Tariff East was unjust and unreasonable, that TNT had failed to rebut this prima facie case, and that the tariff therefore must be cancelled (JA 104a). Exceptions to this decision were filed by TNT (JA 117a) and replied to by Eastern (JA 125a). By order served July 23, 1974 (JA 134a), the Commission's Review Board No. 4 (a three-member employee board) reviewed the matter and affirmed the ALJ's decision.

On October 21, 1974, TNT filed a petition for reconsideration of the case on the existent record and, in addition, for reopening of the proceeding for the purpose of receiving additional evidence (JA 136a). This petition was denied by the Commission, Division 2, acting as an Appellate Division, by order served January 31, 1975 (JA 177a), at which time the proceeding became administratively final.

The instant judicial review action was commenced on or about March 20, 1975. On March 24, 1975, the Commission voluntarily stayed the effectiveness of its prior

orders pending review by this Court (JA 178a).

PROCEEDINGS IN DOCKET NO. 35921 (SUB-NO. 1)

Docket No. 35921 (Sub-No.1), an investigation concerning the lawfulness of Item 52000 of TNT's Tariff No. 14 ("Tariff West"), was commenced by the Commission on December 12, 1973. Except that it applies on the West Coast, Tariff West is identical in its effect to Tariff East and also became effective on or about September 10, 1973. Before the Commission, the Tariff West proceeding was virtually identical to the Tariff East proceeding except in that it began and ended two months later[4/] and in that the tariff was challenged by the Rocky Mountain Motor Tariff Bureau, Inc. rather than the Eastern Central Motor Carriers Association, Inc.

In a decision served on June 20, 1974 (JA 308a), the ALJ concluded that Rocky Mountain had established a prima facie case that an allowance of $1.00 per hundred pounds for delivery of shipments to a forwarder's facilities is unjust and unreasonable. Like the decision in No. 35921, this decision was subsequently affirmed by Review Board No. 4 (JA 330a) and, ultimately, by Division 2 of the Commission, acting as an Appellate Division (JA 378a).

4/ Item 52000 was apparently first brought to the Commission's attention on November 27, 1973 when Rocky Mountain protested a similar provision published for application on the West Coast by the Freight Forwarders Tariff Bureau, Inc.

The orders in No. 35921 (Sub-No.1) were also voluntarily stayed by the Commission pending judicial review. (JA 380a).

STATUTE PRIMARILY INVOLVED

Section 415 of the Interstate Commerce Act, 49 U.S.C. §1015, provides in pertinent part:

> If the owner of property transported in service subject to this part directly or indirectly renders any service connected therewith, . . . the charge and the allowance therefor, to such owner, shall be no more than is just and reasonable. . . .

ARGUMENT

TNT challenges the Commission's orders on essentially four grounds, two of which pertain to the procedural handling of these cases before the Commission and two of which pertain to the substantiality of the evidence upon which the Commission's findings were based. Specifically, TNT contends 1) that the Commission improperly considered the tariffs under investigation as involving allowances; 2) that the Commission erroneously placed the burden of proof upon TNT rather than upon Eastern and Rocky Mountain; 3) that the Commission erroneously found that Eastern and Rocky Mountain had presented evidence which established a prima facie case of unreasonableness, and that TNT had failed to rebut that evidence; and 4) that the evidence does not support the Commission's decision to cancel Tariffs East and West in their entirety.

In discussing each of these arguments, we shall demonstrate that they are uniformly lacking in merit and that TNT has utterly failed to advance a single reason which would justify setting aside the Commission's orders.

I.

THE COMMISSION'S PROCEDURAL TREATMENT OF THESE CASES WAS RATIONAL IN ALL RESPECTS AND DID NOT PREJUDICE TNT IN ANY WAY

A. The Commission Properly Treated TNT's Tariffs As Allowances.

Before the Commission, TNT's principal contention was that its tariffs should be viewed as publishing "dock rates" rather than "allowances." Before this Court, TNT has devoted a considerable portion of its Brief to the same theory. Thus, TNT argues that the Commission proceedings were "mislabelled," that dock rates are an established form of ratemaking, that the Commission failed to comprehend the distinctions between dock rates and allowances, and that this "mischaracterization" of TNT's tariffs was prejudicial to that party and constitutes reversible error.

In truth, the Commission understood precisely what was involved in these cases and was entirely justified in treating TNT's tariffs as allowances. TNT's contentions to the contrary amount to nothing more than an ill-disguised attempt to avoid the critical issue involved here - namely, whether the amount of the allowance, or reduction (however it be termed), was just and reasonable.

The standards by which the Commission determines the reasonableness of allowances are firmly established and have met with the approval of the Supreme Court. El Dorado Oil Works v. United States, 328 U.S. 12, 18 n.2 (1946). The amount of the allowance 1) should not be more than is just and reasonable for the service or instrumentality furnished, and 2) should not exceed the reasonable cost to the owner

of the goods of performing the service or furnishing the instrumentality used. Combined Bill of Lading - Freight Bill Allowance, Eastern Central States, 323 I.C.C. 168, 172 (1964); Allowances for Privately Owned Tank Cars, 258 I.C.C. 371, 378 (1944), aff'd sub nom. El Dorado Oil Works v. United States, 328 U.S. 17 (1946). In other words, whenever existing rates are altered to provide an allowance, or reduced rate, in order to compensate the owner of goods for rendering a portion of the transportation service normally rendered by the carrier, the Commission's concern is that the amount of the allowance not exceed the cost of performing that portion of the service. 5/

An analysis of the "distinctions" between allowances and dock rates upon which TNT relies so heavily reveals that such alleged distinctions are either nonexistent or of no consequence to the issues involved here. Put most simply, an allowance is given whenever a rate reduction is made in order to compensate a shipper who performs a part of the carrier's normal transportation service. A dock rate is simply a rate which has been reduced in order to compensate the shipper who elects to perform a particular transportation service normally provided by the carrier - namely, the pick-up of the freight at the shipper's dock. Any distinctions

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5/ While the cost to the shipper is of primary concern, evidence of the cost to the carrier is given considerable weight.

which exist are more a matter of form than of substance and the Commission has always recognized that the amount by which a dock rate differs from a pickup rate is an "allowance." Thus, in Freight Forwarder Allowances at Baltimore, Md., 315 I.C.C. 719, 720 (1962), the Commission observed (emphasis added):

> Lifschultz's present dock rates from Baltimore to Chicago reflects [sic] a 15-cent allowance in lieu of pickup on shipments which weigh less than 5,000 pounds, and a 5-cent allowance in lieu of pickup on shipments weighing 5,000 pounds or more. From Baltimore to Milwaukee, Lifschultz's present dock rates reflect a 5-cent allowance on shipments weighing less than 5,000 and the same allowance on shipments weighing 5,000 pounds or more.

The Commission has also recognized that it is immaterial whether the full rate is paid and a portion of that amount returned to the shipper or a reduced rate is paid in the first instance. Central Territory Motor Carrier Rates, 31 M.C.C. 273, 279 (1941). Such considerations relate only to the procedures by which the allowance is implemented, but do not directly bear upon the substantive consideration of whether the amount of the allowance is just and reasonable. Moreover, even those procedural distinctions are not so significant as TNT would have the Court believe. For example, TNT states (TNT Br.28) that allowances, unlike dock rates, benefit only the shipper of freight, but not the consignee. However, the Commission has recognized that allowances may be paid to either consignors or consignees. Pickup and Delivery Allowance at Detroit, Mich., 301 I.C.C.

319 (1957).

There is likewise no merit to TNT's contention (TNT Br. 26) that the reasonableness of allowances and dock rates is judged by different standards. In an investigation concerning the lawfulness of an allowance, the most relevant evidence is that which compares the cost of the service provided by the shipper with the amount of the allowance, but the Commission will also consider evidence which relates the cost of the reduced service which the carrier performs to the full rate reduced by the amount of the allowance. Freight Forwarder Allowances at Baltimore, Md., 315 I.C.C. 719, 720, 721 (1962). In an investigation concerning the lawfulness of dock rates or reduced rates of any kind, the same inquiries are made and the same type of evidence is considered. Thus, the primary focus will be upon a comparison of the amount of reduction in rate to the amount of reduction in service, but the reduced rate may also be justified by comparing it to the carrier's costs in performing the reduced service. Again, the only possible distinction is clearly one of form rather than substance, and the form in which TNT published its Tariffs East and West - the utilization of conversion tables to apply a flat reduction of $1.00 per hundred pounds to existing full service rates - clearly invited a comparison of that $1.00 allowance to the cost of performing the pickup service.

B. The Commission Did Not Place the Burden of Proof on TNT to Justify Its Allowances.

TNT argues at length (TNT Br. 42-50) that the Commission erroneously placed the burden of proof on it to justify tariffs which were never suspended and had already become effective on September 10, 1973. Even a cursory review of the Commission's reports and orders demonstrates that the burden of proving the tariffs unlawful remained at all times with the complainant motor carrier associations and that the burden of producing evidence justifying these tariffs shifted to TNT only after a prima facie case of unlawfulness had been established.

The ALJ's report in each proceeding, after thoroughly summarizing and discussing all of the evidence, explicitly states that the protestant had "made out a prima facie case that granting $1.00 per hundred pounds for delivery of shipments to a forwarder's facilities, in lieu of a forwarder providing the service,. . . is unjust and unreasonable" (JA 113a; 313a). The fact that TNT's tariffs had been shown to be unjust and unreasonable was reiterated by Review Board No. 4 in each case (JA 134a; 330a). And, contrary to TNT's assertion before this Court (TNT Br. 44), the ALJ in the Tariff East proceeding plainly afforded TNT's already effective tariff treatment different from that afforded Lifschultz's not yet effective tariff. In short, the burden of proof was properly

allocated in these cases and TNT received the full benefit of the presumption that rates which have been properly published and allowed to become effective without investigation are reasonable.[6/]

In any event, it must be remembered that, wherever the burden of proof might have rested at the time of the administrative proceeding, before this Court a presumption of validity attaches to the Commission's decision. Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 512 (1944); Carolina Freight Carriers Corp. v. United States, 307 F. Supp. 723, 731 (W.D. N.C. 1969). The "heavy burden" of proving that the Commission has acted unlawfully rests squarely on the party challenging the Commission's decision. Permian Basin Area, 390 U.S. 747, 767 (1968); Richard Dahn, Inc. v. Interstate Commerce Commission, 335 F. Supp. 337, 339 (D. N.J. 1971). The Commission's orders cannot be set

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6/ Despite the fact that TNT's tariffs were treated as if they were properly published and were allowed to become effective without protest or suspension, a brief word must be added about the manner in which those tariffs were published. The fact is that TNT's tariffs were not published in strict compliance with the Commission's tariff rules so as to give interested parties a fair opportunity to protest. While the Commission did not rely upon this defect in publication in finding that TNT's tariffs had been shown to be unjust and unreasonable, we raise this point now simply because TNT continues to find it "difficult. . . to conceive" (TNT Br.34) that the tariffs were allowed to become effective without protest.

As TNT points out (TNT Br.34), the allowances involved here were first published as Item 619A in Supplements 29 (JA 382a) and 122 (JA 384a), respectively, to tariffs of the ABC Freight Forwarding Corporation and the Midland Forwarding Corporation. And, as TNT notes (TNT Br. 39-40), (FOOTNOTE CONTINUED ON NEXT PAGE).

aside on the ground of procedural unfairness unless it is shown that the Commission's actions were arbitrary and capricious. And, as the Supreme Court recently noted in Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974):

> Under the 'arbitrary and capricious' standard the scope of review is a narrow one. A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.'

6/ (Footnote continued from page 17)
Item 619A refers, respectively, to Supplements 30 and 123, which are conversion tables applying the $1.00 allowance to existing rates and which carry the statement, "This supplement contains changes resulting in reductions." (JA 387a; 409a). What TNT fails to point out is that Item 619A in Supplements 29 and 122 improperly display the Commission's "no increase or reduction" symbol (▲) rather than the "reduction" symbol (▼) which should have been utilized. The experienced tariff reader concerned with increases and reductions would therefore not have been alerted that a rate reduction was being published and would not have referred to Supplements 30 and 123. This defect was not cured when the allowances were republished by TNT in Tariffs East and West since, by an admitted "oversight" (TNT Br. 40), they were not symbolized as new matter for the account of National Carloading Corporation.

Again, the purpose of this brief discussion of the defect in publication is simply to show the Court why TNT's tariffs were allowed to become effective without protest. As one witness for Eastern stated, "If the original publication had been properly symbolized this Association would have most certainly filed a protest against the matter." (JA 82a).

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDINGS THAT THE $1.00 ALLOWANCE HAD BEEN SHOWN TO BE UNJUST AND UNREASONABLE

We have demonstrated that the Commission properly viewed TNT's tariffs as creating allowances and correctly employed the precedents and criteria applicable to allowances in determining the lawfulness of those tariffs. In addition, we have demonstrated that the Commission properly placed upon Eastern and Rocky Mountain the burden of proving the allowances unlawful and that the burden of producing evidence to justify the allowances shifted to TNT only after a prima facie case of unlawfulness had been established. Thus, TNT's claim of procedural unfairness in the conduct of the subject administrative proceedings has been shown to be without merit.

TNT's remaining contentions relate more to the substantiality of the evidence upon which the Commission's orders are based. Of course, decisions of independent regulatory agencies must be sustained where the agency has acted within its statutory authority and its decision rests upon adequate findings which, in turn, are supported by substantial evidence on the record as a whole. Illinois C. R. Co. v. Norfolk & W. R. Co., 384 U.S. 57 (1966); United States v. Pierce Auto, 327 U.S. 515, 535 (1946). "Substantial evidence" has

been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion", and, in stricter judicial terms, as "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." This is "something less than the weight of the evidence; and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence". Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-20 (1966).

In reviewing the evidence upon which the present Commission orders are based, it must be remembered that determinations as to the justness and reasonableness of rates are peculiarly a matter for the judgment of the Commission. Montana-Dakota Utilities Co. v. Northwestern Public Service Comm'n, 341 U.S. 246, 251 (1951); Board of Trade of Kansas City, v. United States, 314 U.S. 534, 545-46 (1942); Ryder Truck Lines, Inc. v. United States, 308 F. Supp 341, 343 (M.D. Fla. 1969). Mr. Justice Cardozo aptly summarized the principles of judicial review in rate cases in Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-87 (1934), as follows:

> The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. [Citations omitted].
> It is not the province of a court to absorb this function itself. [Citations omitted].
> The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.

A. The Evidence Supports the Commission's Finding As To Each Tariff That A Prima Facie Case of Unlawfulness Had Been Established.

As we have noted, in order for an allowance for delivery to the forwarder's facilities to be just and reasonable, the allowance must not exceed the cost to the forwarder or to the shipper, of performing the pickup function. Whichever of these costs is lower represents the maximum amount of allowance permissible. Combined Bill of Lading - Freight Bill Allowance, 323 I.C.C. 168, 172 (1964); Freight Forwarder Allowance at Baltimore, Md., 315 I.C.C. 719 (1962). The reason for this rule is quite simple - an allowance which exceeds the cost of providing the service involved constitutes an unlawful rebate to the shipper. And, even where the forwarder makes this rebate available to all shippers on an equal basis and enlists the enthusiastic support of the shipping public, such practices "can result, contrary to the National Transportation Policy, in unfair and disruptive competitive practices, not only among carriers within the

same mode of transportation, but with carriers in other modes as well." (JA114a; 313a).

Since the yardstick by which an allowance is judged is the cost of providing the service, it stands to reason that cost evidence is essential in order to justify, or prove unjust, any allowance. In the present case, Eastern and Rocky Mountain introduced evidence of average pickup costs which established a prima facie case that the allowance of $1.00 per hundred pounds was excessive. TNT elected not to introduce evidence of the cost to itself or to shippers of performing the pickup service, 7/ but instead argued, and continues to argue (TNT Br. 37, 43, 49, 54-55), that the Eastern and Rocky Mountain evidence was entitled to no weight because it was based upon motor carrier rather than freight forwarder costs. TNT argues that "distinctions" between motor carrier and freight forwarder operations make the motor carrier

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7/ TNT did assert generally that its costs were "skyrocketing" and alluded to the record in Ex Parte No. 296, Procedures for Partial Recoupment of Increased Carrier Labor Costs. However, TNT never offered any specific evidence and incorporation of evidence introduced in other proceedings is prohibited by the Commission's General Rules of Practice, Rule 82, 49 C.F.R. §1100.82, in the absence of stipulation. As the ALJ noted (JA114a), "To state that costs are 'skyrocketing' does not establish the level of the costs, so that a comparison can be made between them and the allowance."

cost evidence irrelevant. However, an analysis of these alleged distinctions as well as the evidence itself reveals that the Commission acted well within its discretion in affording weight to this evidence. Utilizing data prepared and published by the Commission in Cost Statement No. 2C1-71, "Cost of Transporting Freight By Class I and Class II Motor Common Carriers of General Commodities," Eastern (JA86a) and Rocky Mountain (JA228a) demonstrated that the cost of pickup in Eastern Central Territory was less that $1.00 per hundred pounds on all shipments of 500 pounds or more. 8/ In addition, the evidence indicated that the cost of pickup in cents per hundredweight dramatically decreased as the size of the shipment increased so that the average cost of pickup for a typical 5,000 pound shipment moving in Transcontinental Territory was only 33.3 cents per hundredweight (JA289a). In light of this evidence, it became clear that TNT's flat allowance of $1.00 per hundredweight on shipments of any size far exceeded the average cost of performing the pickup function.

The excessive nature of the $1.00 allowance was also demonstrated by comparing it with the existing allowances published by TNT, by other freight forwarders and by motor

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8/ In other territories the cost of pickup was even lower, dropping below $1.00 per hundred pounds on shipments of 400 pounds or more (JA89a).

carriers. Existing allowances ranged from a low of 5 cents per hundredweight to a high of 20 cents per hundredweight (JA84a). 9/ TNT continues to argue (TNT Br. 38) that it "would defy logic" to compare these existing allowances to its "dock rate," but we have already shown that there is no substance to TNT's dubious distinction between allowances and dock rates; the comparison is appropriate because both the existing allowances and the $1.00 "dock rate" purport to compensate the shipper for performing the identical pickup function.

A far less appropriate comparison is one which TNT made before the Commission (JA41a; 212a) and continues to rely upon before this Court (TNT Br. 38-40). In an attempt to justify its allowance for pickup of $1.00, TNT compared full service class rates with commodity rates which did not include pickup. However, Eastern was quick to point out the inappropriateness of this comparison in that commodity rates are usually dictated by special competitive circumstances while class rates generally reflect the maximum rate level (JA93a). Accordingly, TNT's Exhibit No. 1 was entitled to little weight.

9/ The only allowance comparable to TNT's was the allowance of $1.00 published by Lifschultz Fast Freight, Inc., which was intended to compete with TNT's Tariff East. The Lifschultz allowance was suspended and was found to be unjust and unreasonable in I.C.C. I.+S. Docket No. 8894.

It was upon consideration of all of this evidence that the ALJ in each proceeding concluded that a prima facie case of unlawfulness had been established which TNT failed to rebut. TNT's primary contention with regard to the evidence is that the Commission should have given no weight to cost evidence based upon Statement No. 2C1-71 in that this evidence pertained only to motor carrier, but not freight forwarder, costs. In pursuing this line of argument, TNT alludes to "distinctions" between motor carrier and freight forwarder operations (TNT Br. 51-54), but for the most part fails to explain just what these distinctions are and how they affect the cost of providing pickup service.

The only "distinction" which TNT does attempt to explain proves to be nonexistent. TNT asserts (TNT Br. 37) that freight forwarders may provide pickup with their own equipment only within their terminal areas, while a motor carrier's "sphere of operations is not limited to commercial zones."[10/] In making this assertion, TNT has blurred the distinction between linehaul operations, which are not involved in this case, and pickup service, which is involved.

10/ For an explanation of the terms "terminal area" and "commercial zone," see Commercial Zones and Terminal Areas, 54 M.C.C. 21, 50 (1952). For present purposes, it is sufficient to note that the terminal areas of freight forwarders and motor carriers are coterminous, and are also both generally coextensive with the commercial zone of any given municipality. Investigation Into The Scope of Freight Forwarder Terminal Areas, 343 I.C.C. 565, 567 (1973).

For both motor carriers and freight forwarders, rates named from a given point apply within the commercial zone or terminal area of that point. The pickup of freight is a service provided only within the commercial zone or terminal area and may be provided to the same extent and in the same manner by freight forwarders and motor carriers. The transportation of freight from beyond the commercial zone or terminal area is a linehaul function which is covered by different rates and subject to different cost considerations.[11/] Since the cost evidence submitted by Eastern and Rocky Mountain pertained solely to the pickup function, and since this function is performed in an identical manner by motor carriers, freight forwarders or shippers---namely, by means of a truck and driver traversing the same streets---the Commission "was entitled to regard" the motor carrier cost evidence as representative of the costs which

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11/ Indeed, TNT could not lawfully offer an allowance to shippers for delivery to the forwarder's facilities from points outside the terminal area since that is a transportation service which the forwarder is not obliged to, and may not lawfully, perform. An allowance may be paid only for services which the carrier must ordinarily provide, United States v. Baltimore & Ohio R. Co., 231 U.S. 274 (1931); Pickup of Multiple Shipments at Rochester, N.Y., 309 I.C.C. 413 (1960); otherwise the shipper would be receiving something for nothing.

would be incurred by forwarders or shippers. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288 (1974).

In any event, TNT in effect admitted that motor carrier cost evidence was probative when it belatedly attempted to introduce additional evidence based upon motor carrier costs. At the time TNT filed its petition for reconsideration, but long after the time has passed for rebutting protestant's prima facie case, TNT petitioned for further hearing for the purpose of introducing the Verified Statement of Craig F. Rockey (JA351a). The Commission subsequently denied those petitions for reconsideration and further hearing (JA177a; 378a) and the Rockey statement was never formally introduced as evidence. However, an examination of Mr. Rockey's statement reveals that he utilized the Commission's Statement No. 2C1-71 and that he found "no reason to suppose that the equipment, facilities, labor or other operational characteristics of the pickup service of Class I common carriers would differ materially from those involved in the pickup operations of freight forwarding companies, cartage operators, or shipper-owned truck fleets" (JA152a). Thus, TNT's own witness belies that party's contention that motor carrier cost evidence was insufficient to establish a prima facie case.

Certainly in light of this evidence, and TNT's complete failure to introduce competent cost evidence to rebut the prima facie case, the Commission was justified in concluding that the $1.00 allowance was excessive. In addition, the Commission acted well within its discretion in denying TNT's petitions for reconsideration and further hearing. The legal standard applicable to the denial of such petitions is whether the Commission has clearly abused its discretion in so acting. United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535 (1946). Moreover, even a claim of "new evidence" not earlier available "will not justify a holding that the denial of a rehearing was an abuse of the agency's discretion." Campus Travel, Inc. v. United States, 224 F. Supp. 146, 149 (S.D. N.Y. 1963).

TNT's petitions for further hearing filed in both the Tariff East and Tariff West proceedings failed to comply with Rule 101(b) of the Commission's General Rules of Practice, 49 C.F.R. §1100.101(b), which governs such pleadings. That rule provides:

> "Rehearing or further hearing. When in a petition filed under this section an opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and an explanation must be given why such evidence was not previously adduced."

Thus, a petition for further hearing is expected to (1) set forth the new evidence to be produced, (2) show that the evidence is likely to cause a different result, i.e., is not cumulative, and (3) explain why the evidence was not produced at the original hearing. See, Yourga v. United States, 191 F. Supp. 373, 377 (W.D. Pa. 1961).

TNT has offered no explanation whatsoever for its failure to offer cost evidence at the appropriate time to rebut the prima facie case established by the protestants. Moreover, there is no reason to believe that the Rockey statement would have changed the outcome had the Commission granted further hearing. As previously noted, the most significant aspect of the Rockey statement is that it utilized the Commission's Statement No. 2C1-71, Cost of Transporting Freight by Class I and II Motor Common Carriers of General Commodities, thereby undercutting TNT's argument that motor carrier cost evidence is irrelevant. Even if Mr. Rockey's manipulations of this data are accepted at face value,[12/] he concludes (JA 158a)

12/ In computing pickup costs, Mr. Rockey utilized the full costs presented in Column 4 of Table 2 of Statement No. 2C1-71 (JA 157a), even though the Statement at page 13 explains (JA 165a): "No separation has been made to recognize any difference in the cost of picking up versus the cost of delivering the same or similar shipments. Therefore, one-half the pickup and delivery costs shown in Table 2 represent pickup costs and one-half represent delivery costs."

that the cost of pickup falls well below $1.00 per hundredweight on shipments of 2,000 pounds and up. Moreover, his efforts to show that the average weight of shipments subject to the allowance would be under 2,000 pounds were misguided; he offered no evidence whatsoever of the average weight of those shipments which the shipper would elect to deliver to the forwarder's facilities, even though under Tariffs East and West the shipper has unbridled discretion in this regard.

In sum, the record contains more than substantial evidence to support the Commission's finding that a prima facie case of unlawfulness was established by protestants and was not rebutted by TNT. Having failed to present any evidence which would justify an allowance of $1.00, TNT would now have the Court believe that it merely declined to attempt the "impossible task" of submitting the individual costs of "all potential shippers and consignees" (TNT Br. 58). TNT knew, or should have known, that the Commission imposes no such impossible burden and that representative shipper cost evidence would have been acceptable. See Forwarder Pickup Allowances at Los Angeles and Anaheim, Calif., 310 I.C.C. 469 (1960); Pickup and Delivery Allowance at St. Louis and Kansas City, 64 M.C.C. 163 (1955); cf. Class Rates and Ratings, Malone Freight Lines, Inc., 304 I.C.C. 395, 398 (1958).

B. Substantial Evidence Supports The Commission's Orders Requiring Total Cancellation Of Tariffs East And West

The Commission's orders cancel Tariffs East and West entirely - that is, without exception as to any geographic area or weight category to which those tariffs were applicable. TNT takes issue with the scope of the Commission's decision, but advances no sound reasons why the Commission should have dealt with these tariffs on a piecemeal basis. Even more significantly, TNT was hardly consistent in raising these arguments before the Commission. In the Tariff East proceeding, TNT complained of the geographic scope of the ALJ's findings in its exceptions to that decision, but abandoned that line of argument on petition for reconsideration. At no time in that proceeding did TNT argue that, conceding the relevance of motor carrier cost evidence, the tariff should be severed and saved as to shipments weighing 400 pounds or less. It is well settled that issues may not be argued on review which are not raised and preserved before the Commission. United States v. L. A. Tucker Truck Lines, 344 U.S. 33 (1952).

In any event, the Commission's orders are not lacking support in the record. In emphasizing that Tariff East was challenged by only the Eastern Central Motor

Carriers Association, Inc. although that tariff applied in other regions as well, TNT implies that the Commission is without the power to cancel rates unless protests are filed by competing carriers. TNT apparently forgets that both of these proceedings were instituted by the Commission on its own motion pursuant to Section 415 of the Interstate Commerce Act! Although the Commission relies to a great extent upon the complaints of interested parties, such complaints are not indispensible. With regard to the evidence introduced here, even if that evidence had, on its face, related solely to Eastern Central Territory, the Commission, in its discretion, could have found that evidence to be representative of the cost of pickup in other territories. But the fact is that Eastern's evidence demonstrated the unlawfulness of the $1.00 allowance in the Central, New England Group II, and Middle Atlantic Regions as well (JA 89a).

Nor is there any merit to TNT's unsupported contention that the tariffs should have been preserved as to shipments weighing 400 pounds or less. These tariff provisions were intended to apply on shipments of all sizes and are not susceptible to such a piecemeal approach. Having determined that, on the whole, an allowance of $1.00 per hundred pounds is excessive, the Commission was fully

justified in concluding that this unlawfulness pervaded the entire tariffs. Rather than seeking to preserve this excessive allowance on a relatively few shipments of 400 pounds or less, the proper course for TNT is to publish a more reasonable allowance applicable to shipments of all sizes.

III.

THE COMMISSION'S ORDERS ARE SUPPORTED BY ADEQUATE FINDINGS

Almost as if for "good measure," TNT closes its brief (64-66) with a further attack upon the Commission's orders on the ground that they utilized "boiler plate language" and "failed to adequately explain themselves." However, TNT itself makes no effort whatsoever to explain in what respect, if any, the Commission's orders are unclear.

The requirement of adequate findings is intended simply to insure that the parties and the reviewing court are apprised of what action the agency has taken and why it has done so. In the instant Commission proceedings it is abundantly clear that each ALJ ordered the cancellation of the $1.00 allowance because a prima facie case as to its unlawfulness had been established and had not been rebutted by TNT. There can be no confusion as to the meaning of these initial decisions.

Moreover, it is well settled that no more than summary findings are necessary to dispose of petitions for reconsideration or rehearing. Carolina Scenic Coach Lines v. United States, 59 F. Supp. 336, 337 (W.D. N.C. 1945), aff'd, 326 U.S. 680 (1945); Watkins Motor Lines, Inc. v. United States, 243 F. Supp. 436, 443 (D. Neb. 1965). As the

statutory three-judge court stated in National Trailer Convoy, Inc. v. United States, 293 F. Supp. 630, 633 (N. D. Okla. 1968):

> Summary denial of such a petition is appropriate and "further findings and conclusions are unnecessary if it is clear that the Commission gave due consideration to the petition." Colorado-Arizona-California Express, Inc. v. United States, 224 F. Supp. 894 (D. Colo. 1963). In this case the Commission, in its order denying the petitions for reconsideration, stated that "no sufficient or proper cause appears for reopening the proceedings for reconsideration or to receive additional evidence". And the plaintiffs have failed to show wherein or in what way the grounds for their motion for reconsideration would require the Commission to reconsider its order. Absent such showing we cannot say that the Commission has abused its discretion.

Here, the orders of Review Board No. 4 (JA 134a; 330a) reflect the Commission's careful consideration of the entire record, including TNT's allegations of error, and make the finding that "the evidence. . . does not warrant a result different from that reached by the Administrative Law Judge . . ." And TNT's petitions for reconsideration and further hearing were denied, in turn, "for the reason that sufficient grounds have not been presented to warrant granting the action sought" (JA 177a; 378a). No more detailed findings were required.

CONCLUSION

For all of the foregoing reasons, we submit that all aspects of the Commission's decision are rational, based upon adequate findings and well supported by substantial evidence. Accordingly, TNT's petition should be dismissed and all relief denied.

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CERTIFICATE OF SERVICE

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